UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

STAR WEST SATELLITE, INC.,	)	
	)	
Respondent	)	
	)	Case No. 19-CA-133107
and	)	Case No. 19-CA-135489
	)	Case No. 19-CA-144419
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 206 affiliated with INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
	)	
Charging Party.	)	

STAR WEST SATELLITE, INC.'S POST-HEARING BRIEF

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I. INTRODUCTION

The evidence introduced at the hearings held on June 9, 10, and 30 and July 1, 2015 demonstrates that the claims the General Counsel ("GC") alleged in the Second Amended Complaint ("Complaint") are wholly without merit and that the Complaint should be dismissed in its entirety because, as more fully set forth below:

1. The claims alleged in Paragraphs 6(b), (c), and (d), 10, and 11 of the Complaint, that Star West Satellite, Inc. ("Company") discriminatorily suspended and then terminated Tye Thomas ("Thomas"), should be dismissed because (a) there is no credible evidence that Mr. Thomas' protected conduct was a motivating factor in the Company's decisions and, (b) in any event, given Thomas' undisputed gross insubordination – his repeated refusals to follow reasonable direct orders to carry a standard load, even after being given numerous chances to comply - the Company would have taken the same action even if Thomas had not engaged in any protected conduct.

2. The claims alleged in Paragraphs 7(b) and (e), 10, and 11 of the Complaint, that the Company discriminatorily suspended John Davis ("Davis"), should be dismissed because (a) the Union waived those claims by accepting the Company's December 23, 2014 offer to reinstate Davis in exchange for waiving his rights to any backpay, (b) in any event, there is no credible evidence that Davis' protected conduct was a motivating factor in the Company's decision to suspend him, and (c) given Davis' safety violations and prior misconduct, the Company would have taken the same action even if he had not engaged in any protected conduct.

3. The claims alleged in Paragraph 7(d), (e), and (f), 10, and 11 of the Complaint, that the Company constructively discharged Davis, should be dismissed because there was no evidence that the Company made Davis' working conditions so unbearable that a reasonable person would have no option but to resign, much less that the Company did so because of Davis' protected conduct. To the contrary, Davis resigned because he found what he considered to be a better job working as a Business Manager for a nearby Toyota dealership.

4. The claims alleged in Paragraphs 9(c), (d), (e) and (f), 10, and 12 of the Complaint, that the Company refused to bargain with the Union before suspending Thomas and Davis, should be dismissed because they are based on the Board's decision in *Allen Richey, Inc,* 359 NLRB No. 40 (2012), which the Supreme Court voided in *NLRB v. Noel Canning*, 134 S. Ct. (2014). No such pre-suspension duty exists under the currently effective Board law, *Fresno Bee*, 337 NLRB 1161 (2002). *See High Flying Foods,* Case No. 21-CA-1355596 (May 19, 2014). Also, even if such an obligation exists, the record shows that the Company complied with that obligation by (a) reaching an agreement with the Union to first suspend any employee suspected of serious misconduct for 10 days and then, if requested by the Union, to bargain over

the suspension during the 10-day period before deciding whether to terminate the employee, and (b) following that procedure insofar as it concerned Thomas and Davis.

5. The claims alleged in Paragraphs 9(a), (e), and (f), 10, and 12 of the Complaint, that the Company unlawfully changed employee schedules, should be dismissed because (a) the claims are barred by the doctrine of collateral estoppel given the Board's decision in *Star West Satellite*, Case No. 19-CA-075668 (2013) ("*Star West I*") and, in particular, the portion of the decision that involved Joseph Severson found at pages 20-3; (b) the Company has a well-established practice of requiring maximum flexibility from its technicians to meet the varying demands of its only customer, DISH Network, and these schedule changes fell within the scope of that practice, and (c) the changes were not material and substantial.

6. The claims alleged in Paragraphs 9(b), (e), and (f), 10, and 12 of the Complaint, that the Company unlawfully posted a notice in July 2014 that changed the practice for requesting time off, should be dismissed because the record shows that the Company did not make any material and substantial changes to its long-standing requirements for requesting paid time off.

II. FACTUAL BACKGROUND

A. The Company's Business.

The Company installs and repairs satellite television and Internet services that DISH Network ("DISH") sells to its customers over a five-state region. This work includes the physical installation of satellite dishes, receivers, and related wiring in the homes of DISH's customers who live throughout this region, as wells as making repairs to the same. Transcript ("Tr.") at 145, 464. The Company provides these services every day of the year. Tr. at 18.

The Company's main office and warehouse are located in Bozeman, Montana. Tr. at 101. The Company also has offices and/or warehouses in several other locations, including Billings, Butte, Helena, Great Falls, Kalispell, and Missoula Montana; Nampa and Post Falls, Idaho; and Clarkston, Tri-Cities, and Twin Falls, Washington. Exhibit R-5 at SW0558-17.

The Company never knows how much work it will receive from DISH in any given week, month, or year. Indeed, over the past 20 years, the amount of the Company's business varied considerably based on a variety of factors including the time of year (football season and summer are generally busier times) and whether DISH was running a promotion. Tr. at 33, 76, 146-7, 464.

DISH expects the Company to meet all of its customers' needs within the five-state region. To that end, DISH regularly sends the Company forecasts of its ("DISH's) expectations of how many qualified technicians the Company will have on hand each day of the week. The forecasts are known as the Resource Planning Tool ("RPT"). The Company must do everything it can to schedule enough qualified technicians to meet the RPT; otherwise, the Company will jeopardize its relationship with DISH. Tr. at 147. Samples of RPTs from 2012 through 2014 are compiled as part of Exhibit R-5.

B. The Company Expects Maximum Flexibility From its Technicians to Accommodate DISH's Varying Demands.

Given the unpredictable nature of DISH's demands, the Company expects maximum flexibility from its technicians. As Judge Meyerson found in *Star West I*, Joint Exhibit ("JE")-1 at 20:

> [T]he technicians who work for Respondent are aware that the nature of the Respondent's business requires maximum flexibility in scheduling in order to meet the demands of DISH Network, which varies considerably from day to day. As I have noted earlier in this decision, the Respondent is unaware from day to day just how many orders for installation and repair it will receive from the Dish

> Network. In order to meet this uncertain demand, the Respondent uses subcontractors to fill in any gaps in staffing, and also expects its own technicians to exercise maximum flexibility so as to be able to work the varying number of hours necessary to get the job done. This has been the past practice of the Respondent and its work force, and I have seen no credible, probative evidence that this practice has changed with the onset of union representation." (Emphasis added).

See also the Company's Handbook, Exhibit R- 3, which provides that an "employee's supervisor will assign all work schedules and as needed may vary an employee's work schedule."

C. The Company Regularly Changes Schedules to Meet DISH's RPT.

DISH issues new RPTs periodically throughout the year. Each time DISH issues a new RPT, the Company attempts to comply with it by adjusting schedules as needed at each of its several offices so as to have the required number of qualified technicians available per office per day. Tr. at 147-48, 154, 173, 464; Exhibit R-3. Among other things, the Company periodically switches back and forth between a four-day schedule (three days off) and a five day schedule (two days off). Tr. at 32, 75, 119. Indeed, at one point in 2013, the Company used a three-day schedule in its Nampa facility. *Star West I* at 27-8.

D. Scheduled Days Off in Nampa.

Given the demand for maximum flexibility and the varying needs of its customer, the Company does not assign employees fixed schedules; however, as a practical matter, Thomas Seitz ("Seitz"), Levi Billman ("Billman"), and Tye Thomas ("Thomas") each ended up generally having the same two or three days off per week, one of which was a Saturday or a Sunday. Tr. at 161; Exhibit R-5. Seitz testified that a Company representative agreed he could have off on Friday and Saturday, Billman testified that the Company agreed he could have off on Sundays and Mondays, and Thomas testified that a Company representative agreed he could have off on Fridays and Saturdays. Tr. at 19, 67, 90.

Weekend days, especially Saturdays, are among the Company's busiest since most of DISH's customers are off those days. Tr. at 38, 76-77, 155. As the summer of 2014 approached, the Company was having more and more difficulty meeting the demands of DISH's RPT, especially on weekends. In April 2014, the Company considered changing Seitz's, Billman's, Thomas' schedules so as to have them work on both weekend days, but the Company ultimately decided to hold off making that change because work orders slowed down somewhat. Exhibit R-5 at SW00460-63; Tr. at 159-60.

By July 2014, the Company was significantly out of compliance with the RPT, especially with respect to weekend coverage, and was jeopardizing its relationship with DISH. As a result, the Company decided that it had to modify schedules again, but this time in a way that required Seitz and Billman to work both weekend days and required Thomas to work on Saturday. Exhibit R-5 at SW00507-08; Tr. at 161.

Nonetheless, on August 1, 2014, Derek Bieri, the Company's Operations Manager at that time, met with Billman and explained that the foregoing changes were temporary and that Billman, Seitz, Thomas would again have their weekend days off as soon as the Company could hire some additional employees. Tr.81. Michael Ward ("Ward"), the Business Manager of the Company's Nampa office, made a similar statement to Seitz. Tr. at 27. Consistent with these statements, on August 4, 2014, the Company announced that it was changing the schedules effective August 7, 2014 so as to reinstate the previously scheduled days off for Seitz, Billman, and Thomas. Exhibit R-5 at SW00558-7.

With one exception, neither Seitz, Billman, nor Thomas actually worked on a weekend day that had been a typical day off before the July 2014 schedule change. First, Seitz, Billman and Thomas went on the strike the first weekend, July 18, 19, and 20, 2014. JE-1 at 2. Second,

Seitz called off the next weekend (for which he was not disciplined), and Seitz returned to his regular schedule the following weekend. Tr. at 26-7, 42. Third, Billman requested and received paid time off for July 25 and 26, 2015 and then quit over the next weekend. Tr. at 78, 80. Finally, Thomas worked on Saturday, July 26, 2014, but then volunteered to work out of town the following weekend. Tr. at 94.

E. Time Off Notice Posted in Nampa.

On or about July 14, 2014 (at or near the same time that the Company announced the July schedule changes in Nampa), the Company posted a notice regarding the procedures for requesting paid time off under the Company's Time Off Benefits Policy. JE-2 at 8 and 12; Tr. at 72. Of the various requirements listed in the notice, including the need to request time off at least 14 days in advance, only two are alleged to have been new: (1) that requests for non-consecutive days off be submitted on separate forms, and (2) that requests for guaranteed time off be requested in advance regardless of current schedule. Tr. at 28-9, 73-4, 95-6. Despite these claims, however, the record shows otherwise.

With respect to the first item, Exhibits R-3 and R-18, which comprise the existing universe of paid time off requests that Seitz, Billman, and Thomas submitted (Tr. at 447-8), demonstrate that each of them consistently requested non-consecutive days off in separate forms.

With respect to the second item, the record similarly shows that the only way to secure guaranteed time off was to submit a timely request at least 14 days in advance. For example, the record shows that when the Company changed from a four day schedule (with three days off) to a five day schedule (with two days off), the employees necessarily lost a scheduled day off. Tr. 32. Moreover, since schedule changes depended on the amount of work DISH was sending at any given time, employees never knew when the schedule would change from a four-day week

to a five-day week. Tr. 40-1, 76, 150, 168. Therefore, to be assured that one would have off on a day that, under a four-day schedule was currently a day off, an employee necessarily had to request that day in advance pursuant to the Company's Paid Time Off Policy. Tr. at 41. 167-8. Indeed, Thomas did this to be certain he would have off for a Friday graduation. R-3 at SE00333; Tr. at 122. Accordingly, the statement in the notice simply reflected the reality that with periodic, unannounced schedule changes being the norm, the only way to secure a guaranteed day off was to request it in advance pursuant to the Paid Time Off Benefits Policy.

F. The Company Suspends and then Terminates Tye Thomas.

1. Thomas' Employment History.

Thomas normally worked out of the Company's Nampa facility. Thomas initially worked as a remote technician and drove a Company truck. Later, the Company promoted Thomas to lead technician/trainer for a year, but then returned him to the technician position; however, when he returned to the technician position, he began driving his own vehicle pursuant to the Company's Technician Owned Vehicle Policy. Tr.at 87-8; R-12.

The default arrangement is that technicians drive Company trucks; however, if a technician has a truck that has "ample interior storage space to accommodate proper and safe storage of work equipment," and "remains in good repair and ... reliable working condition," the Company may permit the technician to use his own truck. Exhibit R-12; Tr. at 301-02. Technicians who use their own trucks receive extra payments at the rate of $0.50 per mile. Tr. at 298.

2. All Technicians Must Carry a Standard Load.

All Company technicians, whether they drive Company trucks or their own trucks, must carry a specified amount of equipment known as a "standard-load." Tr. at 295, 298, 358-9. The Company describes the standard load in printed diagrams, one for a large truck and one for a

small truck. The standard load description changed slightly over the past several years to account for technology updates in DISH's equipment, *i.e.*, as DISH adds or deletes services, related equipment will be added to or deleted from the standard load. Exhibits R-10; Tr. at 293-5.

For example, on March 18, 2014, the Company sent an e-mail to all warehousemen (and Field Service Managers for offices that did not have a warehouseman) that included an updated version of the standard load diagrams to account for a new DISH product known as the Super Joey. Notably, the e-mail added that, "[j]ust a reminder that these changes will be mandatory and will need to be applied to all standard size trucks across the company." Exhibit R-10 at 8.

The Company takes several steps to help insure that technicians carry a standard load: (1) the Company keeps laminated copies of the current standard load diagram at each location where technicians pick up equipment; (2) the Company keeps additional paper copies at each such location (a copy of the Nampa folder containing the diagrams can be found in Exhibit R-11); and (3) the Company keeps copies of the current standard load diagram in binders in all Company trucks. Tr. at 296-8; 380.

The Company requires technicians to carry a standard load so that they can be prepared for a variety of contingencies that typically arise during the work day. For example, although technicians start the day with designated routes, the Company frequently has them perform so-called "add-ons."[1] Another common contingency is defective equipment. To help insure that technicians can efficiently perform both their initially scheduled work and add-ons, the Company

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[1] DISH offers its customers same day service. Thus, when a DISH customer requests same day service, the Company tries to fulfill that request by finding the closest technician and, if the technician has the necessary equipment and the time to perform the job, adding that job to the technician's route for that day.

requires them to carry a standard load, which represents the Company's standard as to what equipment will best prepare them to deal with these contingencies. Tr. at 295-8, 301-2.

Indeed, if a technician carries only the equipment needed for the initially scheduled jobs, or only self-selected additional equipment, and if either some of that equipment turns out to be defective or the technician is asked to do an add-on for which the technician does not have the correct equipment, the Company will (a) at best, incur added wage and mileage costs because a technician who is further away will need to do the work, the assigned technician will need to come back to the warehouse to pick up the equipment, or someone will need to take the time to deliver the equipment, or (b) at worst, fail to fulfill its services commitments to DISH. These problems are exacerbated when the involved technicians drive their own vehicles because that means the Company also will be required to pay them for the additional mileage they drive trying to address the equipment deficiency (at the rate of $0.50 per mile). Tr. at 125-7, 323-4, 359-6.

3. Kunda Discovers that Thomas is Not Carrying a Standard Load.

In early August, the Company's Bozeman office was overwhelmed with work and solicited volunteers from other offices to assist. Thomas volunteered, the Company accepted his offer, and Thomas commenced working out of the Bozeman office on Saturday, August 9, 2015. Tr. 99-100. This opportunity provided Thomas with a considerable benefit in that he could work substantial overtime and also be paid for the mileage he would incur traveling from Nampa, Idaho to Bozeman, MT and back again (approximately $500). Tr. 468.

On Saturday, August 9, and again on Sunday, August 10, 2014, Marcus Kunda ("Kunda"), the Bozeman Field Service Manager, discovered through an examination of Company software that monitors truck inventory (PXYSIS) that Thomas was carrying less than

50% of a standard load on each of those days. Since Kunda was not working either of those days, he planned to address the issue with Thomas on Monday morning, when he (Kunda) returned to work. Tr. at 307-8.

4. Thomas Refuses Kunda's Directives to Carry a Standard Load.

There are inconsistencies in the evidence regarding when and how many times Kunda directed Thomas to carry a standard load and how many times Thomas refused, but Thomas concedes that Kunda told him to do it at least two times and that he (Thomas) refused each time.[2]

a. Thomas' Testimony.

Thomas testified that on the morning of Tuesday, August 12, 2014, Kunda placed the standard load diagram before him (JE 3 at 16) and told him to carry the standard load. Thomas refused, claiming that "I told him I thought it was a lot of weight for my truck." Thomas explained during the hearing (but not to Kunda on August 12) that "[t]heir trucks are always kind of squatting and they have lots of engine problems and I didn't want to put that kind of weight on my truck so I wasn't going to do it." Thomas also initially testified that he had never loaded his truck in that fashion in the past. Tr. at 113.[3]

Thomas further testified that later that day, when he returned to the warehouse, Kunda "brought the diagram back to me and told me I needed to reconsider loading my truck." Thomas stated that he was again intent on refusing, but first asked, "who wants me to take this, Parker

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[2] The Company submits that the credibility disputes regarding these events should be resolved in favor of Kaunda for reasons that are explained more fully below.

[3] Thomas also testified that on the same morning, he was talking to other technicians about the Union when Kunda said, "we don't need a union," "Star West can run their company way better than any union," and Sobrepena "was running the show now and things were going to be better." Tr. at 106.

[Estes, one of the Company's Operations Managers]?" Tr. at 116, 133. Thomas added that immediately after he asked this question, Estes appeared and told him he was fired. Tr. at 116.

Thomas also made the following admissions on cross-examination:

- He was familiar with earlier versions of the standard-load diagram because, when he had been a trainer, he had checked Company trucks to make sure they were carrying the standard load, Tr. at 123-4;
- Its best to have enough extra equipment in your truck to handle add-ons and, because he knew Bozeman would be very busy, he knew add-ons could be expected, Tr. at 125;
- He had previously carried the equivalent of a standard load in his truck, but after having his truck's "top end rebuilt," "I decided I wasn't going to load my trucks like that anymore," Tr. at 131-2;
- Most of the Company's trucks were the same as his, one-half ton pickup trucks, Tr. at 137.

b. Kunda's and Estes' Testimony.

Kunda testified that on the morning of Monday, August 11, 2015, he handed Thomas the laminated copy of the standard load diagram and told him that he (Thomas) needed to carry a standard load. Thomas said no, explaining that it was too much weight for the axel on his truck. Kunda, in turn, responded that the Company used the same trucks as he did (one-half ton pickup trucks) and "ours do just fine." Tr. at 308-9. Kunda also testified that the Company has over 150 such trucks, which are rated to carry up to 1,500 pounds, and he was not aware of any mechanical problems caused by carrying the 520 pound weight of a standard load. Exhibit R-13; Tr. at 309-12.

Later that day, Kunda experienced two situations that exemplified why the Company requires technicians to carry a standard load.

First, technician Jeff Miller, who had carried a standard load that included three receivers, needed a fourth one because he had already used two and his third one was defective. Kunda gave Thomas permission to give Miller one of his receivers. Tr. at 313.

Second, also that afternoon, dispatch called Kunda and asked if they could assign an add-on to Thomas since he was the closest technician. Kunda checked PXYSIS and discovered that, because Thomas had not taken a standard load as directed that morning, he did not have the equipment needed for this job (for reasons unrelated to the extra receiver he had given to Miller), so Kunda told dispatch to assign it to a different driver (who was further away, but had the required equipment). Tr. at 314-5.

On the morning of Tuesday, August 12, 2015, Kunda again directed Thomas to take a standard load, and again, Thomas refused. This time, however, Thomas added that "Parker Estes could not make him carry a standard load." Tr. at 315-6.[4]

Given Thomas' two consecutive refusals to carry a standard load, Kunda reported the events to Estes and Mike Escott ("Escott") who, like Estes, also was an Operations Manager. They, in turn, reported the events to Pete Sobrepena ("Sobrepena"), the Company's President and owner. Sobrepena contacted the Company's legal counsel, George Basara ("Basara"), who advised Sobrepena to have Kunda ask Thomas to carry a standard load one more time, and if he (Thomas) still refused, to treat it as insubordination. Tr. at 317, 365-6, 465-6.

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[4] Kunda testified that on Tuesday morning, Thomas asked for his opinion on the Union, to which he (Kunda) responded, "I don't want to talk about the union." Kunda explained that he did not want to discuss the issue because they are under considerable pressure to get the technicians on the road quickly in the morning. Tr. at 324. Kunda added that he did not know that Thomas had engaged in a strike in July at the Nampa facility and it had no bearing on his directive that Thomas carry a standard load. Tr. at 325.

After speaking with legal counsel, Sobrepena told Estes and Escott to instruct Kunda to tell Thomas one more time to carry a standard load, and if he refused, it was insubordination and he (Kunda) should tell them (Estes and Escott), in which case they should send Thomas back to Nampa for discipline. Tr. at 365-7, 466. Estes and Escott then told Kunda to direct Thomas to carry a standard load one more time, and if he said no, Kunda should tell them and they would handle it from there. Tr. 318, 366-7.

Later that evening, when Thomas reported to the warehouse to drop off a defective receiver,[5] Kunda said "Ty, you really need to carry this standard load," but Thomas refused. Kunda asked Thomas two more times to carry a standard load, but each time, he refused. At that point, Kunda disengaged with Thomas and, as Kunda was walking toward the office to report these events to Estes and Escott, Thomas raised his voice and said, "Is this Parker's idea?" Tr. at 319-20. Estes, who was in an adjoining conference room, heard Thomas' latter statement. Tr. at 367.

Kunda informed Estes and Escott that he had asked Thomas three more times to carry a standard load, and that Thomas had refused each time. Estes and Escott then went into the warehouse (Kunda stated in the conference room). Estes asked Thomas if "he was refusing to carry a standard load," to which Thomas replied, "yes." At that point, Estes said "you're done here. Please return your Star West equipment and return to Nampa." Estes did not say anything else because that was all Sobrepena had told him to do. Tr. at 367-8. [6]

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[5] Kunda testified that he asked Thomas to bring the defective receiver back to the warehouse that evening so that it could be sent back to DISH with the normal Wednesday shipment of defective equipment. Tr. at 318-9.

[6] As described more fully below, the Company previously had agreed with the Union that it would not terminate any employee without first suspending the employee for 10 days and

c. Bohn's Testimony.

Erik Bohn, Field Service Manager for the Nampa office, testified that on occasion, Thomas would refuse to take extra equipment, but he would tell Thomas to take the equipment and Thomas would relent. Tr. at 182.

Bohn also testified that, on the evening of August 12, 2014, Thomas called him to inform him that he (Thomas) had just been fired and if he (Bohn) knew anything about it. Bohn said that he did not. Thomas called Bohn again that evening to discuss his situation. During this call, Thomas told Bohn that:

> [H]e was asked to take additional equipment with him on his route, that he refused, that he said no, or had some kind of refusal. He was asked again, and he reiterated the fact that he was not going to take additional equipment, and that he was fired. He then said that it sounded like I should have taken the equipment, and I [Bohn] agreed with Tye at the time.

Tr. at 181.

5. The Company's and the Union's Initial Agreement Regarding the Procedure for Imposing Discipline.

In late 2013 or early 2014, the Company's attorney Basara and Union representative Barb Stenquist ("Stenquist") agreed upon an arrangement by which the Company would not terminate an employee without first suspending the employee for 10 days, simultaneously sending a letter to the employee, with a copy to the Union, informing the employee (and the Union) of the suspension, and explaining that the Company was willing to discuss the suspension with the Union pending a final decision. This agreement is reflected in nine suspensions notices the Company issued during the period of January 17, 2014 through May 20, 2014, JE-3 at 21-38, and

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giving the Union an opportunity to bargain over the appropriate discipline. Therefore, even if Thomas refused the next directive, the first step in the discipline process was to send him home, following which the Company would discuss the situation with counsel and then, if appropriate, the Human Resources Department would send him a suspension notice. Tr. at 452.

Basara's statements to Stenquist's replacement, James Holbrook ("Holbrook"). Tr. at 54-5. Indeed, after Holbrook replaced Stenquist in approximately June, the Company continued the practice with Holbrook without any objection from him. Exhibit R-10 at SW00648-9; Tr. at 56-7.

6. The Company Suspends and Then Terminates Thomas.

Consistent with the agreed-upon procedure described above, the Company suspended Thomas on August 14, 2014. The suspension letter, a copy of which was simultaneously provided to Holbrook, stated in pertinent part as follows:

> On 8/11/2014 and 8/12/2014 while working out of the Bozeman Mt office you were asked on multiple occasions by the Bozeman Field Service Manager to follow daily companywide procedure and load extra inventory on your truck and you refused saying "no." You also did not take extra inventory in your truck.
>
> As a result of your insubordination, you are suspended without pay or benefits for ten days pending our final decision. We have provided a copy of this memorandum to your Union representative your [sic] James Holbrook in order to notify him of the impending action and provide him the opportunity to discuss this matter with us. His number is ....

JE-3 at 3.

Sobrepena explained that he decided to suspend Thomas because, based on attorney Basara's advice, they had given Mr. Thomas another opportunity to comply with the directive and, after he refused again, "I was just appalled by the fact that he wouldn't carry a standard load" and "I just felt [it was] insubordination and there was nothing more I could do." Tr. at 466-7.

Over the next 10 days, Basara and Holbrook exchanged numerous e-mails and the Company provided information the Union requested. JE-3 a 6 – 20. Nonetheless, in the end, the Company decided to convert the suspension to a termination. As Basara explained to Holbrook:

> [T]he fact remains that he did not do it [carry a standard load after being directed to do so] on two separate days. That is classic insubordination. He was not asked to do anything more than had been asked of him in the past, and what is expected of all Star West techs.
>
> You have not explained why he refused his supervisor's directives, and absent some valid reason, the termination will be upheld.

JE-3 at page 13.

Sobrepena added that, while he was aware of the fact that Thomas had engaged in a short strike in July at the Nampa office, that fact did not influence his decision to terminate Thomas. Sobrepena explained that, notwithstanding (and following) the strike, (1) the Company had given Thomas a considerable benefit by allowing him to come to Bozeman, where he could earn substantial extra pay through overtime and mileage reimbursements, (2) the Company had given Thomas a second chance to correct his misbehavior before taking any action against him, and (3) Thomas' refusal under these circumstances was "total insubordination" and we "couldn't work together." Tr. at 468-9.

G. The Company Suspends and then Reinstates John Davis.

1. The Company Cites Davis for Safety Violations.

In November 2014, John Davis ("Davis"), a technician, suffered a work-related injury when he fell in a customer's home. Davis continued to work on light duty through the remainder of November and returned to full duty on December 5, 2014. Tr. 221.

Safety is very important to the Company and it has worked hard to lower its rate of work-related injuries. Tr. at 326. To that end, shortly after Davis returned to work, Mary Meier, who handles the Company's workers' compensation claims, told Kunda to conduct a spot safety inspection of Mr. Davis to insure he was working safely. Tr. 327.

On December 9, 2014, Kunda visited Davis' work site at a customer's home. As he approached the house, Kunda took two pictures of Davis' Company truck and then, after he arrived, he took a picture of the open back of the truck. Exhibit R-15.

After Kunda arrived at the site and took the pictures, Davis came out of the customer's home and briefly spoke with Kunda. Thereafter, Kunda completed a Job Site Safety Survey in which he reported that Davis had failed in several categories: (a) he was not wearing a hard hat, (b) he was not wearing safety glasses, (c) he did not have safety cones placed around his truck, (d) his truck was not clean and orderly, and (e) his truck was missing a ladder strap. JE-4 at 4; Tr. at 222, 327-9.[7]

Davis and Kunda disagree on the whether he (Davis) should have been cited for any of these violations because they disagree on whether Davis had reached the point of conducting customer education.[8]

a. Davis' Testimony.

Davis claimed that when Kunda first saw him, he (Davis) had already exited the customer's home. Davis testified that the installation was completed, he was about to do customer education, and was entering information on his phone while leaning into the truck. For this reason, Davis asserted that he had already put the safety cones and his tool belt back in his truck and had removed his hard hat and safety goggles. Tr. at 222-3, 260-2. Davis admitted that

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[7] The Job Site Safety Survey states that a hardhat and safety glasses must be worn at all times other than the initial greeting with the customer and at the end when the technician conducts what is known as customer education.

[8] As explained more fully below, the Company submits that Kunda's testimony is more credible.

his truck was missing a ladder strap, but claimed that the Company had failed to give him one and that he had used a chain to tie down the subject ladder. Tr. 228, 262.

b. Kunda's Testimony.

Kunda testified that the installation was not yet completed when he arrived because Davis had not yet connected the DISH satellite to the cable that led into the customer's house. Kunda explained that he watched Davis complete the connection with a wrench, at which point the receiver could begin to download data. The download would take about 20 – 30 minutes, following which the job would be completed and Davis could begin customer education. Tr. at 329-32.

The first two pictures that Kunda took clearly show Davis' truck; however, Davis cannot be seen leaning into his truck, as he claimed. Exhibit R-15. Moreover, the third picture, which reflects the back of Davis' open truck, does not reflect the presence of the safety cones or the tool belt. Exhibit R-15. To the contrary, the picture presents what is clearly an active work site.

c. Padilla's Testimony.

Carlos Padilla ("Padilla") testified that, shortly after Kunda conducted the safety inspection, Davis told him that he (Davis) never had the safety cones – that he in fact had left them at his house that day. Tr. 409.

d. Davis' Weekly Mileage Log and Checklist.

Remote technicians such as Davis complete and then turn in to the Company a Weekly Mileage Log and Checklist. Among other things, the Log requires technicians to note problems with equipment, including "Ladder locks." Davis' Log for the week of December 8, 2014, however, did not mention that the Company failed to provide him with a fourth ladder strap, but did mention that he needed a wash ticket. Exhibit R-9; Tr. at 265.

e. Davis' Signed Vehicle Policy.

The Vehicle Policy that Davis signed stated in pertinent part that "[a]ll ladders must be stored properly on the vehicle. They must be strapped and locked to the vehicle's ladder rack." JE 4 at 21. Davis admits that he had one ladder tied down with the lock, which necessarily means that he did not have both of them locked together, as required by the Policy. Indeed, this explains why, the very next day, one of the ladders was stolen without the lock being cut. Tr. at 263-4.

2. The Company Suspends Davis.

On December 12, 2014, the Company suspended Davis. The suspension notice stated in pertinent part as follows:

> During a Job Site Survey conducted on 12/9/14, you were found to be in violation of several Star West safety standards. These violations include not wearing safety glasses, not placing safety cones around a Star West truck when parked and there was only one ladder strap to hold a ladder on the truck when there should have been a total of four.[9] .... As a result of your violation of safety violations, you are suspended without pay or benefits for 10 days pending our final decision.

JE-4 at 11.

When the Company delivered the suspension notice to Davis, he (Davis) added, in his own handwriting, that he "took off my prescription glasses to fill out paperwork in truck @ end of job." JE-4 at 11. Notably, Davis did not say anything about the missing safety cones or ladder strap. Tr. at 259.

Sobrepena testified that the Company suspended Davis because "I was informed by management what happened with the safety and then I looked back into the history of Davis and did some research on his history. So there was some misbehavior also

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[9] This was a typo and Padilla told Davis later that day that it should have said one ladder strap was missing. Tr. at 260.

involved in that and the type of work that he performed, customer complaints, several of those, so I came to a decision that a suspension [was warranted.]" Tr. at 469; JE-4 at pages 2-7.

3. The Company Inadvertently Failed to Simultaneously Inform the Union of Davis' Suspension.

In late November, Basara, the Company's counsel, and Holbrook, the Union's representative, reached an agreement to follow the same procedure described above for employee discipline – to first suspend the employee for 10 days - but with a revised letter that now stated if the employee was reinstated, the Company would provide the employee back wages and benefits for the time the employee was suspended. Exhibit R-4 at page SW000650.[10]

The parties followed this practice in several disciplinary situations. Exhibit R-4 SW00651-63. However, due to an administrative oversight, the Company did not simultaneously send a copy of Davis' suspension letter to the Union. Nonetheless, Davis himself called the Union that same day, rendering the Company's administrative mistake moot. Tr. at 231. Moreover, when the Union brought this error to the Company's attention, the Company offered to extend the suspension for an additional 10 days so that the parties would have a full opportunity to discuss it. JE-4 at 12.

4. The Company and the Union Agree to Reinstate Davis Without Back Pay.

On December 23, 2014, after informing the Union that Davis' safety violations, along with his prior misconduct could support a termination of his employment, the Company offered

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[10] The Union and the Company agreed to revise the letter again on January 13, 2015, to clarify that back pay would be provided only if, after review of additional information, the Company "determines that the suspension was not warranted." Exhibit R-4 at SW00665.

to reinstate Davis if he would waive his claim for backpay. Holbrook communicated the offer to Davis, Davis agreed to those terms, and then Holbrook informed the Company that the Union and Davis would accept those terms. The Company prepared a draft of a letter to Davis informing him that the parties had agreed to reinstate him with backpay, sent it to Holbrook to review, and Holbrook informed the Company that the letter was acceptable. The Company then sent the letter to Davis, telling him that he could return to work on his next regularly scheduled work day, December 29, 2014 (the letter inadvertently said December 28, 2014). JE-4 at 16-7; Tr. at 246-47.

Before returning to work, Davis renewed his claim for backpay; however, the Company's counsel and Holbrook confirmed their agreement that Davis was to be reinstated without backpay. JE-4 at 26.

5. The Company and the Union Agree to Delay Davis' Return to Work to Accommodate His Transportation Needs.

Davis was scheduled to return to work on Monday, December 29, 2014; however, Davis could not secure a ride to the Helena facility to pick up his Company truck and demanded that the Company provide him with transportation. The Company refused; however, the Company's counsel and Holbrook agreed to extend Davis' return to work date to December 31, 2014 so that Holbrook could drive Davis to the work site. JE-4 at 26.

H. Davis Returns to Work and Then Resigns.

1. Kunda Is In Charge.

Davis acknowledged that, a few days before he returned to work, Carlos Padilla told him that he ("Padilla) was no longer Davis' point of contact and his new point of contact was Kunda, who was now in charge of the Helena office. Tr. at 235, 240, 289. Padilla reaffirmed this point on December 31, 2015, when Davis returned to work. Tr. at 435. Indeed, Davis himself

acknowledged this fact by sending e-mails to Kunda on December 29 and 30, 2014 regarding his return to work. JE-4 at 27-9.

2. Missing Nuts and Bolts.

Davis returned to work on Thursday, December 31, 2014. Davis inspected his vehicle and the equipment that had been loaded into it for approximately 20 – 30 minutes before he left; however, Davis later discovered that certain small nuts and bolts had not been included and, as a result, he could not complete a certain job. Nonetheless, Davis was able to complete other tasks and worked a full day. Exhibit R-7; Tr. at 235. 273-4, 431.

Padilla testified that he inadvertently failed to include the nuts and bolts when he loaded Davis' truck. Padilla explained that, as part of the Company's year-end inventory process, he emptied all trucks and then reloaded them. Unfortunately, he missed these nuts and bolts and apologized to Davis for the mistake. Tr. at 416, 431-2.

3. Missing Cell Phone.

Davis claimed that the Company did not provide him with a Company cell phone when he returned to work. Tr. at 235. However, Kunda and Padilla both testified that Kunda handed the cell phone to Davis, and Padilla added that he later found the cell phone in Davis' truck (below the seat) when he cleaned it after Davis resigned. Tr. at 345, 422-23.

Moreover, on January 1, 2015, Davis sent an e-mail to Kunda complaining about the missing nuts and bolts and his perceived mistreatment. Notably, Davis did not mention not having not being given a cell phone. JE-4 at page 30; Tr. at 269.

4. Davis Works, Calls Off, and Then Resigns.

Davis worked on Wednesday, December 31, 2015 through Saturday, January 3, 2015. Exhibit R-7. Davis was scheduled off on Sunday and Monday, January 4 and 5, 2015, and then

he called off sick on Tuesday and Wednesday, January 6 and 7, 2015. Davis resigned very early on Thursday, January 8, 2015. Exhibit R-7; Tr. at 241.

5. Davis' Vision Insurance Coverage.

On January 6, 2015, Davis discovered that, despite having been paying contributions toward the cost of his family's vision insurance coverage, the carrier claimed that Davis' children were not covered. Davis contacted Tamra Doolittle, the Company's HR, Payroll and Recruiting Manager and she promptly investigated the matter and learned that the carrier had made a mistake and that Davis' children should have been covered. Doolittle convinced the carrier to reinstate Davis' children retroactively; however, Davis was not satisfied with this solution and asked for and received a full refund of the $110 he had paid for the coverage. JE-4 at 33-45; Tr. at 254-6; 454-60. Davis thanked Doolittle for her efforts on his behalf. JE-4 at page 51.

6. Davis Secures Another Job Before he Resigns.

On Tuesday, January 6, 2015 (a day Davis had called off sick), he contacted a Toyota dealership near his home regarding a job opening. The next day (another day Davis had called off sick), Davis applied for a job as a Manager with the dealership. Toyota offered him the job on Thursday and he began working for the dealership on Friday. Davis admitted that, when he resigned from the Company early on the morning of that Thursday, he already knew he would be receiving the offer and would be working at the dealership on Friday. Tr. at 250-4.

Unlike the extensive driving, the overtime, and the heavy manual labor Davis experienced in his job with the Company, Davis' new job was five minutes from his home, it involved less overtime, and it did not involve any manual labor. Tr. at 248-50.

7. Davis' Rationale for Resigning.

Early on the morning of January 8, 2015, Davis sent Kunda an e-mail stating that he resigned. Davis cited several reasons for his resignation. JE-4 at 51.

First, Davis referred to discriminatory remarks regarding his age; however, Davis admitted that no such statements had been made after he returned to work on December 31, 2015. Tr. at 266-7.

Second, Davis claimed that the Company took his cell phone; however, as described above, Kunda and Padilla deny that claim and, to the contrary, Padilla testified that he found the phone in Davis' truck under the seat after Davis resigned.

Third, Davis complained about being routed to Teresa when he called Dispatch; however, Davis admitted that Teresa (a Lead person in Dispatch) never harassed him, Tr. at 271, and Padilla testified that Davis had been routed to Teresa starting in the Fall of 2014, Tr. at 438.

Fourth, Davis complained about the problem with his vision coverage; however, as described above, the problem was caused by the carrier's mistake and, in any event it had been resolved by January 76, 2015.

Fifth, Davis complained about not receiving back pay when he was reinstated; however, as described above, Davis himself and the Union had agreed to those terms.

Sixth, Davis complained about the Company showing apathy toward technicians and ignoring safety; however, as described above, the Company places a high value on safety and cited Davis for safety violations.

Seventh, Davis complained that he called Kunda several times but Kunda never responded; however, Davis only called twice, each time at approximately 3:00 a.m., simply to

tell Kunda that he was calling off sick. Tr. at 272-3, 346-7. Consequently, there was no reason for Kunda to return either call.

8. Alleged Statements by Padilla.

Davis testified that on or about Saturday, Sunday, or Monday, January 3, 4, or 5, 2015 Padilla told him that "you know, off the record, you went to the union there's nothing you can do, you're done. You can just get another job." Tr. 238; 242. Davis acknowledged that Padilla had called him on a personal basis. Tr. at 243.

The GC claims that the foregoing statement violated the Act and that the Company is responsible for the statement because Padilla was a supervisor or an agent. As described above, however, Davis knew before he returned to work on December 31, 2014 that Kunda was in charge of the Helena office and that Padilla was no longer acting on behalf of the Company.

Moreover, Padilla testified that he did not recall any telephone conversations with Davis after Davis returned to work other than the late-night call-offs, Tr. at 444, and Davis admitted that he did not mention Padilla's alleged statements in his January 8, 2015 resignation e-mail. Tr. at 244.

III. ARGUMENT

A. Paragraphs 6(b), (c), and (d), 10, and 11 of the Complaint Should be Dismissed Because the Company Lawfully Suspended and then Terminated Tye Thomas for Gross Insubordination.

The Company lawfully suspended and then terminated Tye Thomas for gross insubordination. Although some aspects of the confrontations between Thomas and Kunda are disputed, those disputes should be resolved in favor of Kunda, as he was the more credible witness. Moreover, even if one credits Thomas' version of these encounters, the GC still failed to establish a prima facie case of discrimination and the Company established its affirmative defense that it would have taken the same action in any event.

1. Credibility.

Thomas conceded that Kunda twice directed him to carry a standard load and that he refused both directives; however, Thomas disputed Kunda's testimony that he (Kunda) had directed him (Thomas) to carry a standard load three additional times.

Thomas testified that Kunda told him to do it once on the morning of Tuesday, August 12, 2014, and once that evening, and that he refused both times. Tr. at 112-3, 116, 133. Kunda, in contrast, testified that he told Thomas to carry a standard load on the morning of Monday, August 11, 2014, again on the morning of Tuesday, August 12, 2014 and three more times that evening, and that Thomas refused on each occasion. Tr. 308-12, 367.

Kunda's testimony should be credited over Thomas' testimony because Kunda was the more credible witness for the following reasons:

- Thomas testified on direct examination that he had "never loaded his truck in that way [in accordance with the standard load diagram Kunda had given him] in the past;" however, on cross-examination, Thomas admitted that he had previously carried the equivalent of a standard load in his truck. Tr. at 113,131-2.

- Thomas testified that he felt carrying a standard load placed too much stress on his vehicle; however, Thomas had no idea how much a standard load weighed and he grossly overestimated the amount by saying he thought it weighed more than 1,000 pounds, when it fact, it only weighed 520 pounds. Tr. at 129-30, 309; Exhibit R-13.

- Thomas testified that, after having his truck's "top end rebuilt," "I decided I wasn't going to load my trucks like that anymore." Tr. at 131-2. However, Thomas never explained how having his "top end" repaired related to carrying a standard load and, in any event, after having been repaired, there is no obvious reason why his truck could not carry a standard load, especially given that he drove the same type of truck that the Company used. Tr. at 137

- Thomas admitted that, when he arrived on the morning of Tuesday, August 12, 2015, "Kunda told me I needed to preload my truck like they load theirs ...." Tr. at 112. However, the only way Kunda knew that Thomas was not loading his truck in that manner was from checking PXYSIS, which Kunda testified he did on the preceding Saturday and Sunday. Tr. at 301. Therefore, it is far more likely that, as Kunda claims, Kunda first communicated this demand to Thomas on the

morning of Monday, August 11, 2014, when he (Kunda) returned to work, rather than Tuesday, August 12, 2015. Indeed, this is what Thomas' Union representative told the Company. JE-3 at 11.

- Thomas wrongly stated in his Affidavit that the Company never changed schedules. Tr. at 119-20.

- Thomas wrongly testified that he had "done tons of requests [for paid time off] before that where I know I had some that were nonconsecutive on the same form." Tr. at 124. As discussed above, however, none of Thomas' paid time off request forms included nonconsecutive days off. Exhibits R-3 and R-18.

- Thomas testified that he discussed union issues with other employees at the Bozeman facility on Saturday, but not on Sunday, because a trainer "who fired people" was present. Tr. at 103. However, Thomas later claimed that he discussed union issues on Monday in Kunda's presence. Tr. at 105. This dichotomy makes no sense since Thomas knew that Kunda was an undisputed supervisor.

2. Applicable Legal Standards.

"In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (lst Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved* in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002)." *DHSC, LLC d/b/a Affinity Medical Center,* 362 NLRB. No. 78 (2015).

"In order to meet its burden, the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action." *Affinity Medical Center, supra.*

If the GC meets this burden of proof, then the employer must show that it would have done the same thing even if the employee had not engaged in the protected activity. *Affinity Medical Center, supra.* However, in making this determination, "[i]t is not within the province of the Board merely to substitute its judgment for that of the employer as to what constitutes appropriate and reasonable discipline." *Hoffman Fuel Company of Bridgeport*, 309 NLRB 327, 329 (1992); *J. Ray Mcdermott & Co.*, 233 NLRB 946, 952 (1977) ("The [B]oard cannot substitute its judgment for that of the employer as to what constitutes reasonable grounds for discharge . . . The question of proper discipline of an employee is a matter left to the discretion of the employer."); *Copper River Grill*, 360 NLRB No. 60, slip op. at 19 (2014) (cautioning that the Act gives ALJs "no authority to substitute [his] judgment for the Respondent's or to sit as an arbiter of 'fairness' in some abstract sense."); *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (noting the Board "cannot function as a ubiquitous 'personnel manager,' supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer").

As a result, disparate treatment must be "blatant" in order to support a violation of the Act, *i.e.,* it must involve "a plain failure by the employer or its supervisors or managerial agents to treat equally-situated employees equally." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998).

As set forth more fully below, the GC failed to meet its burden of proof and, in any event, given Thomas' inexcusable, gross insubordination, the Company proved that it would have taken the same action in the absence of any protected conduct.

3. The GC Did Not Meet its Burden of Proof.

The GC did not meet its burden of proof in this case. The only protected conduct known by Pete Sobrepena, the Company representative who made the decision to suspend and later terminate Thomas, was that Thomas had engaged in a brief strike nearly a month before his suspension, and did so in response to a change in his schedule in Nampa. JE-1 at page 2; Tr. at 468.[11] However, the record does not show that the Company displayed any animus toward that conduct; much less that any such animus was a motivating factor in the Company's decisions to suspend or terminate Thomas.

First, as described above, shortly after Seitz, Thomas, and Billman returned from their weekend strike, the Company permitted Seitz to call off the next weekend without disciplining him and then reinstated their prior scheduled days off. Tr. at 26-7, 42; Exhibit R-5 at SW00558-7. While this incident did not involve Thomas, it shows that the Company did not harbor animus toward any of the strikers.

Second, although Thomas, Seitz, and Billman testified that they were not immediately returned to work when they showed up at the Nampa office on the morning of Monday, July 21, 2014, no inference of animus can arise from the delay in returning them to work. The record shows that, shortly after the strike commenced, the Company's attorney told Union Representative Holbrook that the Company needed 48 hours advance notice of when the strike would end to put the employees back on the schedule.[12] JE-2 at 5. Also, Nampa Business

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[11] Thomas testified that he made certain pro-union statements to Kunda; however, as described above, that testimony is not credible. Moreover, there was no evidence that Kunda conveyed those statements to Sobrepena. Tr. at 102-05. Also, Kunda did not know that Thomas had participated in the strike. Tr. at 325.

[12] Holbrook never communicated that request to the employees. Tr. at 54.

Manager Ward credibly explained that it took that long to put the employees back on the schedule. Tr. at 165.

Third, as Sobrepena explained, following the strike, the Company accepted Thomas' request in early August to perform additional work at the Bozeman office, which provided a significant benefit to Thomas because he would be paid for the extra mileage traveling to and from that office and he and could earn substantial overtime. Tr. at 468. The Company surely would not have given Thomas this opportunity had it harbored animus regarding his strike activity.

Fourth, and most importantly, when Sobrepena first learned of Thomas' refusal to carry a standard load, he conferred with counsel and then directed that Thomas be given another opportunity to comply. This step makes no sense if the Company harbored animus toward Thomas based on his strike or any other protected activities. To the contrary, given Thomas' blatant refusal to carry a full load on the mornings of August 11 and 12, 2014, the Company already had just cause to discipline Thomas had it harbored such animus. Instead, the Company gave Thomas an easy out – another chance to comply. The fact that Thomas elected to not to take that easy out and, instead, continued his defiance, could not reasonably have been anticipated, much less used to show that the Company harbored animus toward him for having engaged in protected conduct.

In sum, there is no evidence that the Company harbored animus toward Thomas for having engaged in any protected conduct, much less that any such animus motivated the Company's decision to suspend and/or terminate him.

4. Even if the GC Met its Burden of Proof, The Company Demonstrated That it Would Have Taken the Same Action in Any Event.

Even if the Company harbored animus toward Thomas' strike activity or other protected conduct and that animus somehow could be viewed as motivating the Company's decisions in any part, which is denied, the record shows that the Company would have taken the same action in the absence of such protected conduct.

First, as described above, the record demonstrates that (a) the Company required all technicians to carry a standard load, (b) the Company had good reasons for applying this rule (to account for the risk of defective equipment and to be able to handle daily add-ons without, in either case, the technician being forced to return to the shop to pick up more equipment or have someone else deliver it and thereby increase the cost of the job), and (3) Thomas refused to comply with five direct orders to comply with this rule. These facts, which were referenced in the suspension letter the Company sent to Thomas and the termination decision e-mail Company attorney Basara sent to Union representative Holbrook, JE-3 at 3 and 13, unequivocally establish that the Company suspended and then terminated Thomas for gross insubordination, which is a type of misconduct that routinely warrants termination.

Second, Thomas easily could have complied with the Company's directives, but made an unprotected, unilateral decision not to do that. Thomas admitted that he had carried a full load in the past, that he understood the importance of carrying extra equipment, and that he expected add-ons would be part of his work in Bozeman. Tr. at 125-6, 131. Nonetheless, after he had the top of his truck rebuilt, Thomas "**decided I was not going to load my trucks [sic] like that anymore**." (Emphasis added.) Tr. at 132. In short, Thomas made a unilateral decision that he would not comply with an established rule, but no principle under the Act privileged Thomas to make such a decision.

Third, Thomas did not identify a credible excuse for not complying with Kunda's directive: (a) Thomas claimed that, in his opinion, his truck could not bear the weight of a full load, but it just been repaired and should have been fine at that point, and (b) Thomas' claim that Company trucks appeared to be carrying too much weight was not credible given that they are rated to carry up to 1,500 pounds and a standard load only weighs 520 pounds, and but for Thomas' unsubstantiated claim, there is no evidence that they suffered any mechanical problems due to carrying a standard load. Tr. at 309-12; Exhibit R-13.

Fourth, even if Thomas had not been required to carry a standard load when he worked in Nampa, which is denied, that did not excuse him from complying with the standard load requirement in Bozeman. Kunda and Estes routinely required the employees they supervised to carry a standard load, including technicians who, like Thomas, drove their own trucks. Tr. at 300-1, 369. Therefore, they had no reason to expect anything less of Thomas, and he had no protected right to refuse their directives. Notably, had he been truly concerned about his truck's ability to carry the weight of a standard load, he could have asked to use a Company truck.

Fifth, as Sobrepena explained, after giving Thomas another chance to comply, his refusal to comply cannot reasonably be considered as anything other than gross insubordination.

Sixth, as described above, if an employee committed misconduct that reasonably warrants discipline, the Board cannot consider the level of discipline imposed in the absence of evidence showing blatant disparate treatment, and there is no such evidence in this record.

Seventh, the record strongly suggests that Thomas intentionally attempted to challenge the Company's ability to tell him what to do. Thomas declined several separate opportunities to comply with Kunda's directive and, on August 12, 2014, told Kunda that, "Parker Estes could not even make him take a full load," and later expressly asked Kunda, "Is this Parker's idea?"

Tr. at 416, 320. Thomas disputes the first statement, but concedes that, on the evening of August 12, 2014, he asked, "who wants me to do this. Parker? Tr. at 116. Even crediting Thomas' version, the repeated refusals, along with the statements regarding Estes, strongly suggest intentional, defiant insubordination, which is a type of misconduct that routinely warrants termination.

In sum, given Thomas' undisputed and unjustified refusal to comply with a reasonable Company rule on multiple occasions, Paragraphs 6(b), (c), and (d), 10, and 11 the Complaint should be dismissed because there is no credible evidence that Thomas' protected conduct was a motivating factor in the Company's decisions to suspend and later terminate him and, in any event, the Company established that it would have taken the same actions even if he had not engaged in any protected conduct given his gross insubordination and multiple opportunities to comply.

B. Paragraphs 7(b) and (e), 10, and 11 of the Complaint Should be Dismissed Because The Company Lawfully Suspended John Davis.

1. The Union Waived Davis' Right to Challenge His Suspension.

The Supreme Court "long has recognized that a union may waive a member's statutorily protected rights." *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 447 (D.C. Cir. 2004). When "grievance disputes implicate statutory rights that are 'waiveable' pursuant to collective bargaining, it is appropriate to accede to arrangements reached by the bargaining parties." *Id.* Such agreements serve an "important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation" because they give "final repose for all claims which have arisen out of any and all aspects." *Hughes Christensen Co.*, 317 NLRB 633, 634 (1995), *enfd. den. on other grounds*, 101 F.3d 28 (5th Cir. 1996). Accordingly, grievances "settled in accord with the demands of the employees and their bargaining representative, before

any charges had been filed with the Board . . . are not a proper subject of complaint after settlement has been effected." *Midland Broad. Co.*, 93 NLRB 455, 465 (1951).

Here, the Union waived Davis' claim that the Company discriminatorily suspended him when, with his consent, the Company and the Union reached an agreement to reinstate him without back pay. JE-4 at 16-7 and 26; Tr. at 59-61; 274-5. This agreement was reached "in accord with the demands of the employee[ ] and [his] bargaining representative, before any charges had been filed with the Board . . . [and is] not a proper subject of complaint after settlement has been effected." *Midland Broad,* 93 NLRB at 465.

2. In Any Event, the Board Should Defer to the Settlement.

The Board's deferral principles do not appear to apply to this case since the parties are not bound by a collective bargaining agreement. Nonetheless, if the deferral rules do apply, these facts meet the requirements for deferral.

The Board defers to agreements between employers and unions to resolve disciplinary disputes when (1) the proceedings through which the agreement were made appear to have been fair and regular, (2) all parties agree to be bound, and (3) the agreement is not palpably wrong - meaning it is not clearly repugnant to the purposes and policies of the NLRA. *Alpha Beta*, 273 NLRB 1546, 1547 (1985).

The parties' agreement easily meets all of the standards required for deferral. The agreement was reached through fair and regular bargaining over the discipline. There is no question that all parties agreed to be bound, including Davis. Nor can it be suggested the agreement is "repugnant" to the Act. To the contrary, the Board has upheld similar agreements even without the employee's consent. *Postal Serv.*, 300 NLRB 196, 197 (1990) (deferring to the parties' pre-arbitration agreements reducing employee's suspension with partial backpay, despite

employees' claim that they did not consent to waiver of ULP claims); *Alpha Beta, supra* (deferring to pre-arbitration agreements reinstating employees without backpay, despite the employees' continued attempt to pursue charges with Board).

3. The GC Did Not Meet its Burden of Proving That Davis' Protected Conduct was a Motivating Factor in the Company's Decision to Suspend Him.

First, Sobrepena, the person who approved Davis' suspension, had no knowledge that Davis had engaged in any protected conduct. Tr. at 470.

Second, there is no evidence that the Company held any animus toward Davis' alleged protected conduct.

4. The Company Demonstrated that it Would Have Taken the Same Action Even in the Absence of Any Protected Conduct.

a. Davis' Testimony Was Not Credible.

Davis disputed the Company's assertion that he violated the safety items Kunda noted in the Job Site Safety Survey. JE-4 at 1. Specifically, Davis claimed that he had already completed the job when Kunda arrived and was leaning into his truck preparing his final paperwork and, therefore, he had legitimately removed his hard hat and safety glasses and returned his work belt and safety cones to the back of his truck. Tr. at 222-3, 228. However, none of these statements is credible.

The pictures Kunda took when he arrived at the scene, Exhibit R-15, reveal that: (1) the job was not yet completed; (2) Davis was not at or near his truck when Kunda arrived; and (3) neither the safety cones nor the work belt were in the back of Davis' truck, as Davis claimed. Indeed, Carlos Padilla testified that Davis later told him he had left the cones at home. Tr. at 409.

b. The Company Was Legitimately Concerned About Davis' Work Practices.

The record shows that, on November 1, 2014, Davis injured himself when he entered a small crawl space. Although Davis disputed Padilla's testimony that he (Davis) stepped on a bucket and fell, Tr. at 256, 404, the key points are that whatever occurred, (1) the Company had a legitimate reason to conduct a safety inspection after Davis returned to work to insure that he was following safe work practices, and (2) given its emphasis on safety, the Company was legitimately concerned about Davis' safety violations. Tr. at 326-7.

c. Davis Had a Significant History or Prior Discipline.

The record showed that Davis had six prior incidents of discipline. JE-4 at 2– 7. Although Davis disputed certain aspects of some of the prior events, the fact remains that he was at least partially at fault in each one. Therefore, the Company reasonably took these prior events into consideration when it decided to suspend him. Tr. at 469-70.

In sum, the record shows that the Company lawfully suspended Davis for reasons unrelated to any alleged protected conduct and would have taken the same action had it known of any protected conduct. Therefore, Paragraphs 7(b) and (e), 10, and 11 of the Complaint should be dismissed.

C. Paragraph 7(d), (e), and (f), 10, and 11 of the Complaint Should be Dismissed Because The Company Did Not Constructively Discharge Davis.

1. Legal Standards.

A "constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable." *Adson, Inc.*, 290 N.L.R.B. 501, 502 (1988) (emphasis added).

"Two elements must be proven to establish a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions

so difficult or unpleasant as to force the employee to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Id.* "[T]he proper standard of review requires that the change be so 'difficult and unpleasant' as to *force* resignation."). *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984) (emphasis added). Indeed, the "mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge." *Id.*

2. The Reasons Davis Cited for Resigning Are Neither Credible Nor Unbearable.

Early on the morning of January 8, 2015, Davis sent Kunda an e-mail that cited several reasons for his resignation. JE-4 at 51. However, none of the cited reasons are credible, much less reflect an objectively unbearable situation.

First, Davis cited discriminatory remarks regarding his age; however, Davis admitted that no such statements had been made after he returned to work on December 31, 2015. Instead, they appear to have been made in early to mid-2014 by a supervisor the Company terminated in June 2014. Tr. at 266-7; JE-4 at 53.

Second, Davis claimed that the Company took his cell phone and did not give it back when he returned to work, Tr.at 234; however, (a) Kunda and Padilla deny that assertion and, to the contrary, Padilla testified that he found the phone in Davis' truck under the seat after Davis resigned, and (b) Davis submitted an e-mail after he completed his first day back in which he complained about certain mistreatment, but he did not mention a missing phone – a glaring omission that corroborates Kunda's and Padilla's testimony. Tr. at 269, 345, 422-3; JE-4 at 30.

Third, Davis complained about being routed to Teresa when he called Dispatch; however, Davis admitted that Teresa (a Lead person in Dispatch) never harassed him, Tr. at 271,

and Padilla testified that Davis had been routed to Teresa starting in the Fall of 2014, long before his return to work, Tr. at 438.

Fourth, Davis encountered a problem with his vision coverage; however, the carrier made the mistake and, in any event the problem had been resolved by January 6, 2015, when the Company agreed to Davis' request that it refund the $110 he had paid for his share of the premiums. JE-4 at 33-45; Tr. at 254-6, 454-60. Indeed, in a January 6, 2015 e-mail, Davis thanked Tamra Doolittle for helping him resolve this problem. JE 4 at 51.

Fifth, Davis complained about not receiving back pay when he was reinstated; however, as explained above, Davis and the Union had agreed to those terms before he returned to work.

Sixth, Davis complained that the Company showed apathy toward technicians and ignored safety, but he did not offer any specifics. More importantly, the Company's frequent safety checks shows that it places a high value on safety and, in fact, cited Davis for safety violations. Tr. 326; JE-4 at 1.

Seventh, Davis complained that he called Kunda several times but Kunda never responded; however, Davis only called twice, each time at approximately 3:00 a.m., simply to inform Kunda that he was calling off sick. Tr. at 272-3, 346-7. Consequently, there was no reason for Kunda to return either call.

Eighth, although not cited in his January 8, 2015 e-mail, Davis had complained on January 1, 2015 that the Company failed to load certain nuts and bolts in his truck on December 31, 2015 and that, as result, he was not able to complete one of his jobs; however, Padilla testified that he alone was responsible for not loading the nuts and bolts and that it was an unintentional oversight on his part for which he apologized to Davis. Tr. at 416, 431-2. Significantly, Davis worked the next three days without encountering any similar problems.

Ninth, Davis applied for and secured another job with better working conditions before he resigned. His new job, as a Business Manager for Toyota, was five minutes from his home and did not involve any manual labor. Tr. at 248-54.

In sum, these facts, collectively, demonstrate that the Company did not change Davis' working conditions in any material respect, much less in a way that could be characterized as objectively unbearable. Instead, these facts plainly show that Davis voluntarily resigned because he secured a better work opportunity.

3. Any Changes Davis Experienced Were Not Motivated by His Protected Activities.

First, Kunda was responsible for the Helena office after Davis returned to work; however, there is no evidence that Kunda was aware of any of protected activities by Davis.

Second, the Company had no control over one of the key incidents Davis cited - problems with his vision insurance coverage. In fact, the Company reasonably believed that Davis and his children were fully covered because it had paid its own share of the premiums to the carrier for such coverage. Tr. at 455.

Third, Davis cited an alleged statement by Padilla to the effect that, after having gone to the Union, "there's nothing you can do you're done. You can just get another job." Tr. at 238, 242. However, this statement does not show or suggest that the Company's actions were motivated by Davis' protected conduct for the following reasons: (a) Padilla, a more credible witness, denied making the statement, Tr. at 445; (b) Davis did not mention this alleged statement in his lengthy list of reasons why he resigned, a glaring omission; (c) Davis conceded that Padilla made this statement after Padilla and Kunda had already told Davis that Padilla ceased to have any responsibility for the Helena office, Tr. at 235, 240, 289, 435, and, therefore,

the statement cannot be attributed to the Company;[13] and (d) Davis knew or should have known that Padilla's alleged statement was not credible given that, despite having gone to the Union, the Company reinstated Davis and extended his return to work date to accommodate his transportation problems – conduct that, if anything, demonstrates a cooperative relationship with the Union and the employees who requested the Union's assistance. JE-4 at 16-7, 26; Tr. at 246-7.

In sum, the record shows that, even if the Company changed Davis' working conditions in any material respect, which is denied, it did not do so because of Davis' protected conduct. Therefore, the GC failed to prove that the Company constructively discharged Davis and, as a result, Paragraph 7(d) and (e), 10, and 11 of the Complaint should be dismissed.

D. Paragraphs 9(c) (d) (e) and (f), 10, and 12 of the Complaint Should be Dismissed Because The Company Did Not Have a Duty to Bargain With the Union Before it Suspended Thomas or Davis and, Even if Had Such Duty, it Satisfied that Obligation.

1. The *Allen Richey* Decision is Not Binding or Persuasive Authority.

First, in *Noel Canning,* 134 S. Ct. 359 (2014), the Supreme Court vacated *Allen Richey,* 359 NLRB No. 40 (2012). Therefore, at this point, the controlling authority is found in *Fresno Bee*, 337 NLRB 1161 (2002), which holds that an employer that has not yet reached a collective bargaining agreement need not bargain with the union before it disciplines an employee. *See also High Flying Foods,* Case No. 21-CA- 1355596 (May 19, 2015) (rejecting an attempt to apply *Allen Richey*).

Second, although the GC is seeking to have the Board reissue the *Allen Richey* decision, it is important to recall that the Board's original decision made the bargaining obligations

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[13] Indeed, Davis acknowledged this point by communicating directly with Kunda regarding his return to work issues. JE-4 at pages 27-9.

prospective. Therefore, even if the Board readopts the *Allen Richey* principles, the decision likely will be applied prospectively.

2. The Company Satisfied Any *Allen Richey* Obligations.

First, the Company and the Union reached an agreement on how to address any obligations imposed by *Allen Richey*.

In late 2013 or early 2014, Company counsel George Basara and Union representative Barb Stenquist agreed that the Company would not terminate an employee for misconduct without first adhering to the following procedure: (1) if, after an investigation, the Company determined that serious discipline was warranted, the Company would suspend the employee for ten days; (2) the suspension letter would direct the employee to contact the Union; (3) the Company would simultaneously deliver a copy of the letter to the employee and the Union; and (4) if requested, the Company would negotiate with the Union during the 10-day period before making a final decision. This practice continued even after Holbrook replaced Stenquist. JE 3 at pages 21-38; Exhibit R-4 at SW00648-9; Tr. at 54-7; 452-3.

In mid-November 2014, Basara and Holbrook modified the procedure somewhat – they agreed that the letter would now reflect that if the employee was returned to work, the employee would receive back pay and benefits. Exhibit R-10 at SW00650-63.

In early January 2015, the Company's undersigned counsel David Laurent and Holbrook modified the procedure again by changing the suspension letter to say that the employee would receive back pay and benefits only if, "after review of additional information, the Company determines that the suspension was not warranted." Exhibit R-10 at SW00664-5.

Second, the record also shows that the Company followed this agreed-upon procedure when it suspended and then terminated Thomas. JE-3 at 3 -13; Tr. at 451-2.

Third, the record also shows that the Company followed this agreed-upon procedure when it suspended Davis. Although, due to an administrative oversight, there was a slight delay in delivering a copy of the suspension letter to Union representative Holbrook, the mistake was harmless in that Davis himself informed the Union of the suspension notice the same day he received it, and the Company offered to extend the 10-day bargaining period. JE-4 at 11-2; Tr. at 231.

In sum, the GC's allegations in Paragraphs 9(c), (d), (e), (f), 10, and 12 of the Complaint are without merit and should be dismissed because the Company did not have any duty to comply with *Allen Richey* and, even if it did, it satisfied that obligation by negotiating over, agreeing upon, and following the discipline procedure described above.

E. Paragraphs 9(a), (e), and (f), 10, and 12 of the Complaint Should be Dismissed Because the Company Did Not Unlawfully Change Schedules.

1. The Claims Are Barred by the Doctrine of Collateral Estoppel.

In *Star West Satellite, Inc.*, Case No. 19-CA-075668 (December 2, 2013) ("*Star West I*"), Exhibit R-1, the Board dismissed the GC's allegation that Star West unlawfully "changed the work schedule of its employee Joseph Severson by requiring him to work on Tuesdays [his established day off]," reasoning that because Star West had an established practice of changing employees' schedules, it had no obligation to bargain over such changes. The GC's allegations in Sections 9(a), (e), and (f), 10, and 12 of the Complaint present the same issues as those involved in *Star West I* regarding Severson. Therefore, the GC's claims are barred by the doctrine of collateral estoppel..

a. The Applicable Legal Standards.

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent

suits based on a different cause of action involving a party to the prior litigation." *Allied Mechanical Services*, 352 NLRB 662, 664 (2008). "An issue is 'necessarily determined' if its adjudication was necessary in support of the judgment entered in the prior proceeding." *Id.* See *also Montana v. United States*, 440 U.S. 147, 153-154 (1979). Collateral estoppel promotes judicial economy and "saves the Board from the unnecessary exercise of synthesizing potentially conflicting ALJ decisions on identical matters." *A.W. Farrell & Son, Inc.*, No. 28-CA-085434, 2013 WL 1970243 at n.29 (May 13, 2013).

A party seeking to re-litigate an issue cannot avoid collateral estoppel simply by claiming that the issue arose from a different set of facts than those presented in the previous litigation. In *Sabine Towing & Transp. Co.*, 263 NLRB 114, 120 (1982), the Board explained that, "[i]n *Montana*, the Supreme Court clearly rejected the argument that there must be an identical 'factual stasis' between the first and second proceedings before collateral estoppel applies."

b. *Star West I* Binds the GC in This Case.

In Sections 9(a), (e), and (f), 10 and 12 of the Complaint, the GC alleges that Star West failed to bargain over changes to its Nampa employees' work schedules "by no longer allowing them their regularly scheduled days off." In *Star West I*, however, the Board rejected an identical claim.

In *Star West 1*, the Board adopted Judge Meyerson's finding that Star West had a "standard past practice for all its technicians" of requiring "maximum flexibility in scheduling in order to meet the demands of the Dish Network, which var[y] considerably from day to day." Exhibit R-1 at 20-21 (emphasis added). Based on that finding, Judge Myerson concluded that:

> ... [T]here has been no change in Respondent's past practice regarding work schedule changes and, as that applies in Severson's case in particular, the Respondent was not legally required to negotiate with the Union over its assignment of work duties that required Severson to work on Tuesdays [his

> scheduled day off] and sometimes even longer than 2:00 pm on Tuesdays [after he agreed to work on Tuesday so long as he could leave by 2:00 pm]. (Emphasis added.)

Exhibit R-1 at 21.

The schedule change issue in *Star West I* was "actually and necessarily determined" because it was essential to the resolution of the GC's allegations that the Company had unlawfully changed schedules. Therefore, the Board's determination in *Star West I* that Star West need not bargain with the Union before making schedule changes, even if the changes affect a scheduled day off, precludes the General Counsel from pursing the very same allegations in this case. *See Allied Mech. Servs.*, 352 NLRB at 664 (2008); *Montana*, 440 U.S. at 153-154 (1979).

In further support of this conclusion, Star West relies upon *American Model & Pattern*, 277 NLRB 176 (1985). In that case, the Board had previously found, over the employer's objection, that the employer regularly observed seniority principles when laying off employees. Thus, when the employer sought to again claim that it legitimately retained less senior employees, Judge Maloney Jr. refused to consider the employer's defense. Judge Maloney reasoned "the above-quoted portions of Judge Jacobs's decision make it abundantly clear that the question of whether Respondent in this case observed seniority principles respecting layoffs and recalls was litigated fully and was a pivotal question which was resolved [in that case.] Accordingly, I am precluded from disturbing that finding in this case." 277 NLRB at 181-82.

The same is true here. In *Star West I*, the question of whether the Company has an established practice of requiring maximum flexibility from its technicians and changing schedules to meet the demands of its customer, even when those changes affect an employee's scheduled day off, was fully litigated and was a pivotal question that Judge Meyerson (and the

Board) resolved in favor of the Company. Therefore, the GC is bound by that finding and cannot pursue the schedule change claim alleged in Paragraphs 9(a), (e), and (f), 10, and 12 of the Complaint.

c. The GC's Likely Arguments Should be Rejected.

In its Opposition to Star West's Motion for Partial Summary Judgment on this issue, the GC asserted that collateral estoppel did not apply because, insofar as scheduling was concerned, Judge Meyerson's decision in *Star West I* was "specific to [Mr.] Severson in Helena" and the facts here "are materially different from those involving Severson." The General Counsel is wrong on both points.

First, Judge Meyerson's findings in *Star West* were not specific to Mr. Severson or the Helena location. After hearing testimony from several witnesses, including a technician who worked at the Nampa facility (Levi Billman), Judge Meyerson found that "[t]he technicians who work for Respondent are aware that the nature of the Respondent's business requires maximum flexibility in scheduling in order to meet the demands of Dish Network, which varies considerably from day to day," and that "[t]he Respondent's actions regarding Severson's work schedule was no different than its standard past practice for all technicians." Exhibit R-1 at 20-1 (emphasis added). Based on his finding that the Company had a past practice of requiring maximum scheduling flexibility, Judge Meyerson rejected four different claims related to schedule changes in *Star West I* (expanded use of subcontractors, a change to 10-hour days, a change to a three-day workweek, and the change regarding Severson's schedule, which deprived him of a scheduled day off that had been promised). Therefore, Judge Meyerson's key findings in *Star West I* regarding a company-wide past practice undoubtedly encompassed the employees at its Nampa facility.

Second, the facts in this case are materially the same as those before Judge Meyerson regarding Severson. In both cases, the employees had been told that they could have certain days off, but the Company later scheduled them to work those days given the demands of its customer.

Third, the fact that employees at the Nampa facility testified that, while the Company had changed their schedules in the past, it did not do so in a way that interfered with their scheduled days off, misses the point. Judge Meyerson did not dismiss the GC's claims in *Star West I* because the Company proved that it had made those exact changes in the past. Instead, Judge Meyerson ruled in favor of the Company because he found the Company's practice was broad enough to encompass a wide variety of schedule changes, including one that deprived an employee of a scheduled day off.

Fourth, the GC stated that it would "present evidence that the circumstances of these changes differ from that of Severson, such as demonstrating a lack of voluntariness, found material by Judge Meyerson in regard to Severson." This is a red herring. Judge Meyerson did not find voluntariness material. Instead, he found that "even if not entirely voluntary on Severson's part, the necessity of working extra days or hours is nothing more than the continuation of Respondent's past practice of requiring maximum scheduling flexibility on the part of its employees . . ." Exhibit R-1 at 20-1 (emphasis added).

In sum, collateral estoppel precludes the GC from advancing what is essentially an appeal of Judge Meyerson and the Board's determination that the Company's changes to employees' schedules is within the scope of the Company's established practice of requiring maximum flexibility from its technicians so that it can meet the demands of its customer, even if that interferes with an employee's scheduled day off. Judge Meyerson's finding was not specific to

any one employee or location and none of the facts upon which Judge Meyerson or the Board relied have changed in any material way since November 2013. Accordingly, Paragraphs 9(a), (e), and (f), 10, and 12 of the Complaint should be dismissed.

2. In Any Event, The Changes Did Not Violate the Act.

Even if the GC's allegations are not dismissed based on the doctrine of collateral estoppel, they should be dismissed because (a) the Company demonstrated again in this case that it has a long-standing practice of regularly changing schedules, (b) the Company's Handbook informed the employees that the Company could "assign work schedules as needed and may vary an employee's work schedule, Exhibit R-2, and (c) the temporary changes in this case were not material or substantial.

First, the Company has an established practice of changing technician schedules in an effort to comply with DISH's RPT. While the schedule changes most often involved moving from a four day week to a five day week and back again, they also included moving to a three day week. These changes, by definition, necessarily altered the employees' scheduled days off.

Second, although Seitz, Billman, and Thomas ended up having certain weekend days off, that does not mean that the Company ceded its right to change their schedules. To the contrary, they knew from the Company Handbook and the regular schedule changes that the Company retained the right to change their schedules as needed.

Third, the schedule changes at issue here were not material or substantial. The change was in place for only three weeks and, during that time, only Seitz actually worked one weekend day that had been his day off in the past. JE-1 at 2; Tr. at 2607, 42, 78, 80, 94.

For all of these reasons, the July 2014 schedule changes did not violate the Act and Paragraphs 9(a), (e), and (f), 10, and 12 of the Complaint should be dismissed.

F. Paragraphs 9(b), (e), and (f), 10, and 12 of the Complaint Should be Dismissed Because The Company Did Not Unilaterally Change its Paid Time Off Procedure.

The GC alleges that, in approximately mid-July 2014, the Company posted a notice ("Notice") that unilaterally changed the manner in which employees could take paid time off. JE-2 at 8. However, the testimony of Setiz, Billman, and Thomas – the only evidence the GC presented on this issue - showed that the GC challenged only two aspects of the Notice: (1) that a request for consecutive days off be submitted on the same form, and (2) that a request for guaranteed time off be requested in advance regardless of current schedule. Tr. at 28-9, 73-4, 95-6. Nonetheless, the foregoing testimony was not credible and should be rejected.

First, Exhibits R-3 and R-18, which comprise the existing universe of paid time off requests that Seitz, Billman, and Thomas submitted (Tr. at 447-8), showed that they never once requested non-consecutive days off in the same form. To the contrary, their undisputed practice was to include only consecutive days off in the same form.

Second, the nature of the Company's business is such that an employee necessarily must request a paid day off in accordance with the Paid Time Off Policy to be certain he or she will have that day off. For example, when the Company changed from a four-day schedule (with three days off) to a five-day schedule (with two days off), the employees lost a scheduled day off. Tr. 32. Moreover, since schedule changes depended on the amount of work DISH was sending at any given time, employees never knew when the schedule would change from a four-day week to a five-day week. Tr. 40-1, 76, 150, 168. Therefore, to be assured that one would be off on a day that, under a four-day schedule was a scheduled day off, an employee necessarily

had to request that day in advance pursuant to the Company's Paid Time Off Benefits Policy. Tr. at 41. 167-8.[14]

In sum, the statement in the Notice that an employee needed to submit a timely request for paid time off to be certain he or she would have those days off simply reflected the reality that, with periodic, unannounced schedule changes being the norm, the only way to secure a guaranteed day off was to request it in advance pursuant to the Paid Time Off Benefits Policy. Consequently, the Notice did not unilaterally change the Company's Paid Time Off Policy and the GC's allegations to that effect in Paragraphs 9(b) (e),and (f), 10, and 12 of the Complaint should be dismissed.

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[14] Indeed, although Thomas had been scheduled off on Fridays and Saturdays, he submitted a request for paid time off for Thursday and Friday, May 29 and 30, 2015, to be certain he would have those days off for a graduation ceremony. Exhibit R-3 at SW000333; Tr. at 121-3.

V. CONCLUSION

The GC failed to establish any of the claims alleged in the Complaint. Therefore, the Complaint should be dismissed in its entirety.

Dated: August 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August 2015, a true and correct copy of the foregoing **Star West Satellite, Inc.'s Post-Hearing Brief** was filed and served via http://www.nlrb.gov/e-filing system, and was also served, via first-class U.S. mail, postage prepaid, on:

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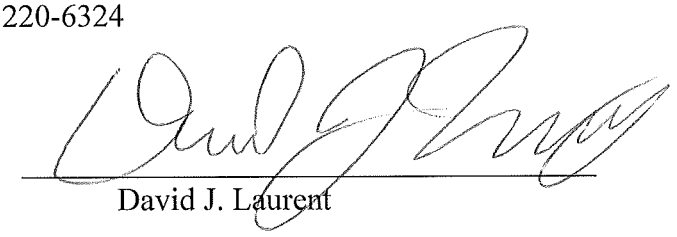

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